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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

M.F., Respondent, v. D.M., Appellant.	E053722 (Super.Ct.No. FAMRS800275) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed with directions.

D.M., in pro. per., for Appellant.

Law Office of Herb Fox, Herb Fox; and Julieann R. Sayegh for Respondent.

I

INTRODUCTION

Respondent D.M. (mother) appeals judgment entered following a trial on a petition to establish paternity, in which the court awarded mother and M.F. (father) equal visitation and joint legal and physical custody of Samantha F. (Samantha). Mother

contends she was deprived of a fair trial before an unbiased judge, in violation of her state and federal constitutional due process rights. She argues the trial court's judges and staff conspired to deprive her of a fair trial because she filed several motions for disqualification of judicial officers under Code of Civil Procedure section 170.1.[1]

Mother also contends the trial court erred in (1) basing its child custody ruling on Internet postings, in violation of mother's state and federal constitutional rights to free speech; (2) changing a temporary custody arrangement in the absence of supporting evidence and in retaliation for mother requesting disqualification of judges in the case; (3) relying on findings by a disqualified judge that mother violated an automatic temporary restraining order (ATRO); (4) making credibility findings that were inconsistent with the evidence; and (5) ordering mother to pay half the cost of a psychological evaluation by Dr. Suiter.

We agree the trial court erred in ordering mother to pay half the cost of Dr. Suiter's psychological evaluation, because father requested the evaluation and the trial court ordered it under Evidence Code section 733. In all other respects, we affirm the judgment. We conclude there was substantial evidence supporting the trial court's findings and judgment, and mother has not established the trial court judicial officers and court staff conspired against her or violated her rights to a fair trial and due process.

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[1] Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

II

FACTS AND PROCEDURAL BACKGROUND

Samantha is five years old. She was born in 2007, in California. Mother and father (parents) did not marry and separated around the time of Samantha's birth. On January 30, 2008, father filed a petition to establish paternity, upon learning mother intended to relocate with Samantha to Texas. Shortly after father filed his paternity petition, mother and Samantha, who was four months old, moved to Texas without father's or the court's consent.

In February 2008, mother filed a request to relocate temporarily to Texas, pending trial on her move-away request. Mother and Samantha returned to California on February 11, 2008, to attend the hearing on mother's request to relocate temporarily. Before the court decided the matter, mother returned to Texas with Samantha. Father did not see Samantha again for three months. On February 15, 2008, Commissioner Gassner denied mother's motion to relocate pending trial. The court noted father objected to mother's request and there had not yet been an independent custody evaluation or an opportunity to present evidence through live testimony. The court appointed Dr. Amy Miller to conduct a psychological evaluation of the parties under Evidence Code section 730.

In May 2008, mother filed an Order to Show Cause (OSC) seeking disqualification of father's attorney, Richard Tuckerman. Commissioner Gassner denied mother's OSC disqualification request. Commissioner Gassner also rejected mother's OSC seeking a finding of inconvenient forum and transfer of the case to another court.

Commissioner Gassner found that Samantha was born in California and lived there until mother moved to Texas with Samantha. When father filed the pending paternity petition, California was the residence of Samantha. Mother then relocated to Texas without obtaining a court order or father's permission. When the paternity petition was served on mother, there were automatic restraining orders (ATROs) issued on the back of the summons. Commissioner Gassner again denied mother's request to relocate pending trial and issued temporary custody and visitation orders. Nevertheless, mother and Samantha remained in Texas. Commissioner Gassner found that mother's actions were inconsistent with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Family Code section 3400 et seq. The court denied mother's request for a stay of the UCCJEA.

In September 2008, mother filed a motion to disqualify Commissioner Gassner and affidavit of prejudice under section 170.1 (170.1 challenge). Commissioner Gassner filed a responsive declaration. Due to the pending 170.1 challenge, Commissioner Gassner continued to November 4, 2008, the hearing on mother's motion to set aside default, quash summons, vacate orders, and remove father's counsel. On October 27, 2008, mother's 170.1 challenge was denied. However, Gassner recused himself and declared a mistrial. Supervising Judge Haight reassigned the case to Judge West, and continued mother's motion to set aside default, quash summons, vacate orders, and remove counsel.

Judge West heard the matter on November 18, 2008. Mother withdrew her motion to disqualify father's attorney and her motion to quash service of summons of the petition to establish paternity. Her attorney accepted service as of November 18, 2008. The

parties agreed the ATROs were not in effect until the date of acceptance of service on November 18, 2008. The court found it had jurisdiction over mother because she had made a general appearance by filing OSC requests and motions.

A. First Trial

An 11-day trial to establish paternity and determine custody and visitation, began on January 5, 2009, and continued through January 22, 2009, with Judge West presiding. At the conclusion of the trial, Judge West ruled that mother could not take Samantha out of the State of California. Judge West further ordered that, while mother was in California, she was entitled to visitation during certain specified times in January and February, 2009. Mother filed a notice of appeal of Judge West's ruling. The Court of Appeal dismissed mother's appeal because it was premature, since a judgment had not yet been entered. On May 20, 2009, the court entered judgment on father's petition to establish paternity.

In June 2009, the trial court stayed the court proceedings on the ground mother had filed a 170.1 challenge against Judge West. Mother also filed a motion for new trial. Judge McLafferty of the Santa Barbara County Superior Court reviewed mother's 170.1 challenge and found that "a person aware of the facts might reasonably entertain a doubt that Judge West was able to be impartial [CCP § 170.1(a)(6)(A)(iii)], . . ." Judge McLafferty explained in his detailed statement of his findings and order that his ruling was based on Judge West not responding to certain allegations and facts in the 170.1 challenge. Father's attorney, Richard Tuckerman, acknowledged that, before Tuckerman was retained by father, Tuckerman had discussed the case in some detail with mother's

father, who was a Los Angeles County Superior Court judge. Judge West allowed Tuckerman to withdraw from a stipulation during a trial, but did not allow mother to do so as to her part of the stipulation. In addition, Judge West denied mother the opportunity to introduce evidence on previously stipulated issues. Mother alleged Tuckerman told Judge West in chambers that mother had destroyed the career of a fine judicial officer (Commissioner Gassner) by filing a 170.1 challenge, resulting in Gassner recusing himself from the case. Judge West responded, "Yes, I know."

Judge McLafferty concluded: "After a careful examination of the whole of the available record, and considering that Judge West does not deny that she had a conversation about the disqualification of Commissioner Gassner and does not address in her Response whether or not Respondent's rendition of the conversation is accurate, a member of the public at large might reasonably entertain a doubt about Judge West's ability to be impartial." Judge McLafferty added that under section 170.1, "[a] finding of actual bias is not required for disqualification to be mandated, and this Court makes no such finding."

After Judge Haight received Judge McLafferty's ruling disqualifying Judge West, Judge Haight heard and granted mother's motion for new trial based on Judge McLafferty's findings and order disqualifying Judge West. Judge Haight vacated judgment entered on May 20, 2009, finding that mother did not receive a fair trial before Judge West in January 2009. The parties were ordered to participate in mediation. In August 2009, Judge Haight ordered the case reassigned to Judge McCarville.

In September 2009, Judge McCarville ordered Dr. Miller to perform a

supplemental psychological evaluation under Evidence Code section 730. With Dr. Miller acting as mediator, in March, April, and May 2010, the parties attempted to settle the matter but were unsuccessful. On November 3, 2010, the court granted father's motion for a psychological evaluation by Dr. Suiter under Evidence Code section 733.

B. Second Trial

Judge McCarville conducted a retrial of the issues of paternity, custody, and visitation on January 18 and 19, 2011. Both parties were represented by counsel. Mother did not renew her request to relocate with Samantha to Texas. At the time of the trial, father was employed as a family medicine resident at Kaiser Permanente Hospital in Riverside. Mother was working as a waitress but had previously worked as a television news writer and assistant producer.

Mother's testimony

Mother testified that she was residing in California when Samantha was born. At the end of January or beginning of February 2008, when Samantha was four months old, mother moved to Texas with Samantha. Pursuant to court order, mother appeared at a court hearing on child support and visitation on February 11, 2008. Although mother was already living in Texas with Samantha, mother requested a court order allowing her to relocate to Texas pending trial on father's petition to establish paternity. On February 15, 2008, after mother and Samantha had already returned to Texas, the court denied mother's request to relocate. Mother and Samantha did not return to California until May 2008. Mother told father he could visit Samantha in Texas but father did not do so. Mother let father see Samantha when mother was required to attend court hearings in

California.

Mother and Samantha moved back to California in January 2009. Mother acknowledged that, from February 2008 until January 2009, there was a court order prohibiting mother from relocating to Texas with Samantha. In January 2009, the court ordered custody and visitation, which essentially remained in effect until the trial in January 2011.

At trial, mother denied that she had posted anything on the Internet regarding the pending case or father. Mother acknowledged, however, that her mother (grandmother) had posted comments regarding Dr. Miller's psychological evaluation report. Mother believed grandmother may have seen Dr. Miller's report while mother was living in Texas with grandmother. Some of the information posted was about visitation exchanges, which mother told grandmother about. Mother said she had been told the websites and postings had been removed. She adamantly urged the creators of the website, "Courthouse Collusions," to take down the comments, and they did so. Mother also spoke to grandmother about removing the private information from the Internet, and the information was removed. Mother claimed she had no control over other websites that might have comments regarding the case.

Mother acknowledged she authored one of the Internet postings but claimed she was unaware the public would have access to it. When she discovered it could be viewed by everyone, she requested it removed. In one of the postings, mother complained about Judge West disregarding Dr. Miller's evaluation and that father worked 70 to 80 hours a week as a first-year doctor. Mother also mentioned in the posting Samantha's age and

that Samantha was being taken away from her. Mother was aware the evaluation reports were confidential. She insisted she requested the postings be removed from the website.

Dr. Suiter's Testimony

Dr. Suiter testified that he performed a psychological evaluation of the parties. He recommended parents have equal visitation and joint legal and physical custody, based on parents' representations that they had been sharing their child equally for the past two years, since January 2009. Mother initially told Dr. Suiter she would like a minimal shift of timesharing to her, which would have resulted in father having the child two days less per month. But when Dr. Suiter met with each parent individually, parents wanted significant changes in the timeshare arrangement. Dr. Suiter concluded there was no basis for changing the equal timeshare arrangement and therefore the existing timeshare arrangement should continue.

Dr. Suiter noted that father was working during the week as a medical resident and mother worked at a restaurant primarily on weekends. Mother's work skills exceeded her current employment and mother indicated she intended to return to her previous field of employment in the news industry, when the opportunity arose. There was no indication either parent had any psychopathology, substance abuse or domestic violence problems. The court admitted into evidence psychological evaluation reports by Dr. Suiter, dated January 9, 2011, and by Dr. Miller, dated July 27, 2008.

At the end of the second day of trial on January 19, 2011, the court continued the trial to April 11, 2011, to allow the parties in the interim to attempt to reach settlement and complete a coparenting program, Solutions for Families A and B. Upon the trial

resuming on April 11, 2011, the parties reported they had completed the Solutions for Families course but had not reached settlement. Mother submitted a declaration proposing a timeshare of father having Samantha one week, from Thursday evening until Sunday morning, and the next week, from Thursday evening until Sunday evening. Whenever father was on call, Samantha would be with mother. Mother requested father provide her with his work schedule. Mother also requested that Samantha attend Arcadia Christian School because it was close to where mother was going to live, it was less expensive than other schools, and it was ranked higher than other schools the parties had considered. The parties submitted on the evidence and made closing arguments. Before taking the matter under submission, Judge McCarville met in chambers privately with Samantha for 10 minutes, to evaluate her cognitive level.

Statement of Decision

On April 14, 2011, Judge McCarville issued a statement of decision. The court made the following findings. Mother violated the ATROs when she first left California. Both parents had a high degree of difficulty coparenting Samantha. Mother was having the most difficulty with coparenting but, during the past 18 months, both parents were trying to set aside their own interests and make decisions in the best interest of Samantha. This difficulty in coparenting was apparent from mother and her family members inappropriately disseminating information on the Internet about the case and parties. Mother denied doing so and claimed it was not her responsibility if someone else was doing it. The court did not find mother credible in this regard. The court indicated that father had also made comments on the Internet. The court noted parents' disparaging

remarks toward each were not in the best interests of Samantha and could be damaging to her and parents.

Based on Dr. Miller and Dr. Suiter's observations and parents' testimony, the court found that father was more believable than mother. Both parents had established a nurturing and stable relationship with Samantha, with frequent and continuous contact with Samantha. This joint custody relationship had existed for over two years and it was not in Samantha's best interest to change that relationship. The court found, based on Samantha's visit in chambers, that she was well bonded to both parents. The court noted both Dr. Miller and Dr. Suiter recommended equal visitation, with joint legal and physical custody. Significantly decreasing Samantha's time with either parent would not be in Samantha's best interest and would be detrimental.

The court made the following orders. The parties were awarded joint legal and physical custody of Samantha, with Samantha living with each parent alternating weeks. There would be a Sunday exchange at 5:00 p.m.; a midweek visit on Wednesday, with the exchange to take place after school or at 10:30 a.m., if there was no school that day. The timeshare was to be 50/50. As to school placement, the court ordered that Samantha attend Arcadia Christian School because of its proximity to mother's home and Samantha's age. The court further ordered that mother reimburse father for $2,400, half the cost of Dr. Miller's report, and pay Dr. Suiter $1,750 as her share of the cost of his report. The court declined mother's request that father provide her with his actual work schedule but advised the parties to keep each other generally apprised of their work schedules. On May 5, 2011, the court entered a judgment of paternity, incorporating the

court's findings and orders included in the statement of decision.

On May 26, 2011, after mother's attorney withdrew as counsel, mother filed a motion for new trial and notice of appeal of the May 5, 2011 judgment. On May 31, 2011, mother filed a 170.1 challenge against Judge McCarville. Judge McCarville ordered mother's motion for disqualification stricken under section 170.2, subdivision (b).

On June 6, 2011, mother filed in this court a petition for writ of supersedeas and emergency stay of the May 5, 2011, order. This court summarily denied mother's writ petition and request for a stay.

III

FAILURE TO ESTABLISH A COURT CONSPIRACY

Mother contends that trial court judges and staff conspired to deprive her of a fair trial because she filed requests for disqualification of several judges (170.1 challenges). Mother argues that the evidence, including Dr. Miller and Dr. Suiter's reports, overwhelmingly favored mother, yet Judge McCarville decreased her share time with Samantha from 60/40 to 50/50.

The elements of a claim of civil conspiracy "are (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design. [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062.) A conspiracy may be proved with inferences drawn from circumstantial evidence, as direct evidence is usually unavailable. (*Peterson v. Cruickshank* (1956) 144 Cal.App.2d 148, 163.)

In this case, the evidence is simply insufficient to support a finding on appeal that judicial officers and court staff actively participated in a conspiracy to deprive mother of a fair trial. This is because, "[I]t is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. [Citations.] It is not the province of the reviewing court to analyze conflicts in the evidence. [Citation.] Rather, when a finding of fact is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted, which will uphold the disputed finding. [Citation.]" (*Berniker v. Berniker* (1947) 30 Cal.2d 439, 444 (*Berniker*); see also *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658 (*Boeken*).) "'Findings of fact must be liberally construed to support the judgment.' [Citation.]" (*Gordon v. City Council of Santa Ana* (1961) 188 Cal.App.2d 680, 686.)

We cannot say that, here, the average person viewing the facts and circumstances in the instant case would conclude the judicial officers and court staff involved in this matter were biased against mother and conspired against her to deprive her of a fair trial. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104-105.)

Mother argues that comments made by Judge Williams during a brief hearing on July 17, 2009, show that court judges and staff were aligned against her to deprive her of

a fair trial. Judge Williams told her that she "created a bad situation" for herself by filing a 170.1 challenge against Judge West. Judge Williams added, "You put yourself behind the eight ball on this when it otherwise would just be a simple motion for new trial." Judge Williams noted that the time to file a notice of appeal would not be stayed by delays caused by requesting recusal under section 170.1.

When Judge Williams made these statements, mother was in pro. per. and had just filed a motion for new trial and a 170.1 challenge against Judge West. Mother had also indicated that she intended to appeal Judge West's trial ruling. It is apparent from these circumstances and Judge Williams's statements to mother, that he was attempting to guide mother in the process of challenging Judge West's ruling by explaining to her that, rather than filing a postjudgment request to disqualify Judge West, the most expedient and simplest way to challenge her ruling was to simply proceed with the motion for new trial before Judge West and then, if the motion was denied, appeal Judge West's trial ruling. He also reminded mother of the time limitations for filing an appeal. Judge Williams's comments can reasonably be construed as merely attempting to assist mother in timely and expeditiously moving forward with her appeal.

Mother believes that, because several judges and court staff did not agree with her requests and arguments, that they were conspiring against her in an attempt to antagonize, intimidate, and deprive her of a fair trial. The record does not reflect this. Just because the court ruled against mother does not establish there was a conspiracy against her, particularly when the court's rulings were reasonable. Mother complains that the court staff committed inappropriate, abusive acts against her. But there is no evidence in the

record, either direct or indirect, that either judicial officers or court staff were actually conspiring to impede mother's due process rights to a fair trial. Mother must show more than that the trial court ruled against her, particularly when the record shows that the rulings were generally well founded, reasonable, and within the court's discretion. Here there is substantial evidence to support the trial court's findings, and "[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Mother asserts that clerical staff provided her with misinformation and refused to provide information she requested when mother began making posttrial motions and sought appellate remedies. For instance, she claims that at least one court reporter omitted statements by a judge while the parties were before the court and staff in the clerk's office knowingly provided false information regarding the location of a court file. Mother fails to cite any evidence in the record substantiating these claims, other than her own self-serving declaration filed in support of her postjudgment motion for disqualification of Judge McCarville.

Although Judge McLafferty ordered Judge West disqualified, his ruling was based on the finding that "a person aware of the facts might reasonably entertain a doubt that Judge West was able to be impartial [CCP § 170.1(a)(6)(A)(iii)]," because she had agreed with attorney Tuckerman's comment that mother had destroyed the career of a fine judicial officer, Commissioner Gassner, by filing a disqualification request, resulting in Gassner recusing himself from the case. Although this could possibly support an

inference Judge West was impartial, it does not support such a finding as to the subsequent judges involved in the case, since, in accordance with Judge McLafferty's ruling, supervising Judge Haight granted mother a mistrial and reassigned the case to Judge McCarville. There simply is no evidence that any judicial officer or court staff member conspired to deprive mother of a fair trial.

IV

INTERNET POSTINGS

Mother contends the trial court erred in basing its child custody ruling on Internet postings, in violation of mother's state and federal constitutional rights to free speech. During the second trial, father offered evidence of Internet postings believed to be posted by mother. The postings mentioned the names of father and Samantha, and criticized father, the court, and psychological evaluation findings. At trial, mother denied discussing the court proceedings on the Internet or posting any comments regarding the case. Mother was shown a 10-page Internet posting stating, "Toddler traumatized." Mother said she did not write the Internet posting. Her mother (grandmother) wrote it. Mother denied showing grandmother Dr. Miller's psychological evaluation report but suggested grandmother may have looked at it while mother was living with grandmother. Mother also conceded that she provided grandmother with some of the information contained in the posting.

When father's attorney asked mother whether she considered the 10-page posting private information, mother testified that it was "[t]o a certain extent," and then explained: "Matters concerning my daughter are private, but I feel in agreement with my

mother that when a child has the same negative reaction to leaving every week, that something should be done about it so that it changes."

Another Internet posting introduced as evidence stated that father violated a court order and lied to the police. Mother acknowledged she had sent information to someone who operated a website, without knowing the information would be posted. In this regard, mother conceded in her appellate opening brief to "making a posting on an NODR website about being ordered to meet with Dr. Suiter" for an Evidence Code section 733 evaluation, not realizing the posting would be viewable by the general public. Mother requested the creators of the website, "Courthouse Collusions," remove the postings regarding her case, and she believed the postings had been removed from the Internet. As to any other postings by third parties, mother said she had no control and should not be held responsible for them.

During the trial, father requested that the court order mother not to post anything regarding the confidential court proceedings or disseminate any confidential information about the proceedings to third persons. The parties stipulated to this, and the court so ordered it.[2]

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[2] Mother asks this court to note that the court reporter omitted a statement by the court at the end of the trial, noting that "After this case People will think twice about posting on the internet." Since the statement is not in the record on appeal, this court will not consider it. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364; Rule of Court, rule 8.155(c).) Also, since mother has not followed appropriate procedural requisites, we deny mother's request in her appellate opening brief to order the court reporter to provide the audio tape of the proceeding. (Rule of Court, rule 8.155(c).) Mother has neither cited any authority supporting such an order nor has she

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Judge McCarville stated in his trial statement of decision that Dr. Suiter's testimony and Dr. Miller's report provided clear and convincing evidence that parents have had a high degree of difficulty coparenting Samantha. Judge McCarville found that mother was having the most difficulty, with such difficulty apparent from mother and her family members inappropriately disseminating information on the Internet about the case and parties. Although mother denied doing so, the court did not find mother credible in this regard.

Mother argues that the trial court unfairly relied on untrue accusations that she made improper, harmful Internet postings about the case, and such findings resulted in the trial court entering orders penalizing her for protected speech. We first note that, during the trial, mother, through her attorney, stipulated not to make any comments on the Internet regarding the confidential court proceedings. Mother further acknowledged that personal information about the case shared with the public could be detrimental to Samantha. Second, there was ample evidence that mother was responsible for at least one inappropriate Internet posting regarding the case and grandmother was responsible for other Internet postings of a derogatory and inappropriate nature, violating the privacy of the court proceedings and the involved parties. Third, Judge McCarville's trial decision does not indicate it was founded on his finding that mother had made Internet postings, apart from the one she conceded she had instigated. He did indicate, however,

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[footnote continued from previous page]
established that such an order would result in producing any relevant, admissible evidence that would have any impact on the outcome of this appeal.

that he believed mother was responsible in some part for dissemination of the information on the Internet but did not state that he was penalizing her in any way for such conduct. Rather, he stated that, during the past 18 months, the parties were doing better at coparenting and putting the child's interests before their own. The court's reference to the Internet postings in the statement of decision was merely used to illustrate mother's difficulty in coparenting. Furthermore, there was other evidence upon which the court could have reached its conclusion mother was having difficulty coparenting.

Mother has not established that the trial court committed prejudicial error or violated her rights to freedom of speech by considering the Internet evidence when deciding father's petition to determine paternity, child custody and visitation. Such evidence was relevant to protecting the child's best interests. "Courts are given broad authority to supervise and promote the welfare of children. (Fam. Code, § 3022.) . . . Parents are routinely ordered not to make disparaging comments about the other parent to the children or in their presence." (*In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 725 (*Candiotti*).)

We recognize that the court cannot impose an order "actually impinging on a parent's right to speak about another adult, outside the presence of the children. Such an order, under these circumstances, constitutes undue prior restraint of speech." (*Candiotti, supra,* 34 Cal.App.4th at p. 725.) "While a court's power is broad, it is not plenary." (*Ibid*.) But "[t]he court may properly issue orders bearing upon parents' relationships with their children and with each other." (*Ibid*.)

Here, mother has not cited any actual court order which prohibits mother from speaking about father or the case outside the presence of Samantha. The court's orders in the statement of decision and judgment of paternity do not mention the Internet postings and there is no evidence that the court penalized mother for them. The court's statement of decision and judgment appropriately and lawfully state: "The parties are restrained from making negative comments about one another in the immediate presence of the minor. Both parties shall not discuss the nature of this custody visitation and/or support litigation in the presence of the minor or in any way involve the minor in this case unless required to do so by court order."

It does appear that, during the trial, the court made an order, in accordance with the parties' stipulation, that they would not post derogatory comments on the Internet about the case or the parties, and would not disclose confidential information regarding the case to third parties. Mother has not challenged on appeal this order and it therefore is not the subject of this appeal. Even if it were challenged, mother forfeited the objection by not raising it in the trial court (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1 (*Olson*); *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1117 (*Steven W.*)), and by stipulating to the order (*People v. Wickersham* (1982) 32 Cal.3d 307, 330).

V

CUSTODY ORDER

Mother contends the trial court erred in substantially changing the temporary custody arrangement by reducing her timeshare from 60/40 to 50/50. Mother argues the

timeshare change was not supported by substantial evidence and was in retaliation for mother's 170.1 challenges.

The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. Under this test, an appellate court must uphold a trial court ruling if it is correct on any basis, regardless of whether such basis was actually invoked. (*Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 995-996.) Generally, the overarching standard governing all child custody proceedings is the best interest of the child. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255 (*Montenegro*).)

Thus, "[w]hen there are competing parental claims to custody, the family court must conduct an adversarial proceeding and ultimately make an award that is in 'the best interest of the child.' (§ 3040. subd. (b).) The purpose is to maximize the child's opportunity to develop into a stable, well-adjusted adult. The child's welfare is paramount and the 'overarching concern.' (*Montenegro, supra,* 26 Cal.4th at p. 255.) . . . [¶] Once there has been a final judicial determination regarding the best interest of a child, the dual goals of judicial economy and protecting stable custody arrangement preclude a de novo examination. [Citation.]" (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1053.)

Here, the trial court made a determination of custody in an adversarial proceeding, as contemplated under *Montenegro*. After a contested hearing on the competing parental claims to custody or visitation, the court made its custody orders, applying the "best interest of the child" standard. We conclude there was no abuse of discretion in ordering joint legal and physical custody, with an equal timeshare arrangement. The court

attempted to order visitation and physical custody consistent with the existing temporary custody order, which had been in effect for over two years, with a slight modification to accommodate Samantha starting school in the near future. The court noted that, "To in any way lessen the amount of time to a significant degree that either [father] or [mother] shares with the minor would not be in the best interest of the minor and in fact this Court finds would be detrimental to the minor."

Mother argues that because Judge McCarville was not impartial and was biased against her, he reduced her time share 80 hours a month. The timeshare in effect at the time of the trial consisted of Samantha staying with father from Thursday evening until Sunday morning, and then the next week, staying with father from Thursday evening until Monday morning. At trial, father requested that visitation and custody change to alternating weeks, because Samantha would be starting preschool. Mother proposed a different schedule that reduced father's timeshare. Mother requested that Samantha stay with father from Friday at noon until Sunday night, so that mother could take Samantha to school every day.

The permanent court-ordered timeshare arrangement required the parties to share the minor on a week-to-week basis with a Sunday exchange at 5:00 p.m., and a mid-week visit, beginning after school. Holidays were to be alternated year to year. The court order also included provisions for vacations and other special occasions. As with the previous temporary timeshare arrangement, the new permanent timeshare arrangement provided both parents with nearly equal and alternating time with Samantha so as to allow both parents to maintain a strong and consistent relationship with their daughter,

which was in the best interest of Samantha. Mother has failed to show that the court's custody and visitation orders were unreasonable or unsupported by substantial evidence. Mother also has not established that Judge McCarville was biased against her or impartial.

VI

AUTOMATIC TEMPORARY RESTRAINING ORDERS

Mother contends Judge McCarville's erroneous reliance on the ATROs as a basis for reducing mother's timeshare from 60/40 to 50/50, also demonstrated that Judge McCarville was prejudiced against mother because she had filed 170.1 challenges against previous judges and was granted a new trial. We disagree.

The record indicates the circumstances regarding the ATROs were confusing and it was somewhat unclear as to when and whether mother was subject to the ATROs when she initially moved to Texas with Samantha. On February 1, 2008, father personally served mother but mother claimed she was not properly served. Mother appeared at the hearing on February 1, 2008, and the court granted mother's request to lift the standard ATROs to allow mother to relocate with Samantha temporarily to Texas, until the next hearing on February 11, 2008.

Although mother and Samantha returned to California on February 11, 2008, to attend the hearing on mother's motion to relocate, they returned to Texas before the court decided the matter a few days later. Despite the court's ruling denying mother's motion to relocate, mother remained in Texas with Samantha. On June 9, 2008, Commissioner Gassner again denied mother's request to relocate pending trial and denied a stay of the

UCCJEA. Nevertheless mother remained in Texas with Samantha. On November 18, 2008, the parties stipulated and the court ordered that mother was not properly served with father's petition until November 18, 2008, and therefore the ATROs were not in effect until that date. As a consequence, mother had not violated the ATROs up until that time, but she did violate the court's other orders not to relocate with Samantha out of state. Mother testified at the second trial before Judge McCarville that she did not move back to California with Samantha until January 2009. She also acknowledged that from February 2008 until January 2009, there was a court order in effect, denying mother permission to relocate to Texas with Samantha.

Under these confusing circumstances, we cannot say that Judge McCarville's finding that mother violated the ATROs shows he was biased against mother or impartial. Furthermore, there was no showing that the timeshare arrangement ordered by Judge McCarville was based on such a finding or would have been any different had he concluded there was no ATRO violation, particularly since mother violated similar orders prohibiting her from leaving California with Samantha.

Mother also complains that Judge McCarville improperly relied on Judge West's statement of decision in formulating the visitation schedule. During the second day of trial, father's attorney mentioned Judge West's statement of decision and mother's attorney objected because the prior judgment had been vacated. Judge McCarville agreed that Judge West's findings and decision had no effect. Judge McCarville noted that mother had relied on Judge West's statement of decision as "an aid to [mother] in trying to come up with a vacation plan" and, therefore, the court would "use it only for that

purpose." Mother's attorney did not object to this and therefore forfeited on appeal any objection to the court merely considering the statement of decision in this regard, but not finding it binding on the court. (*Olson, supra,* 14 Cal.App.4th at p. 15; *Steven W., supra,* 33 Cal.App.4th at p. 1117.)

VII

CREDIBILITY FINDINGS

Mother contends that Judge McCarville's credibility findings were inconsistent with the evidence and were made with the ulterior motive of impeding mother's appeal. Mother notes that Judge McCarville stated in his statement of decision that "As indicated earlier the court finds that both parents are attempting to act in the best interest of the child but *with respect to the issues of credibility the court finds [father] carries the day and is more believable in the court's eyes than [mother].* This decision . . . is based upon review of all the evidence which takes into account the observations of both the 730 and 733 experts who interviewed and evaluated both [father] and [mother]. It also takes into account the court's observation of both the parties as they testified in court." (Italics added.)

Mother argues that the experts' findings contradict the court's credibility findings. But it is within the purview of the trial court to make its own findings on credibility, and this court must defer to the factual determinations made by the trial court, if supported by substantial evidence. (*Berniker, supra,* 30 Cal.2d at p. 444; *Boeken, supra,* 127 Cal.App.4th at p. 1658.) Here, there was substantial evidence supporting the trial court's credibility findings, even though there was also conflicting evidence supporting contrary

findings. We note Dr. Miller's report was written in July 2008, whereas the trial was two and a half years later, in January 2011, and the court found that parents' coparenting had improved since then.

Mother cites conflicting evidence, including father's various statements as to the number of hours he was working. But any inconsistencies between father's statements to Dr. Miller and Dr. Suiter, and his trial testimony in the second trial do not demonstrate that Judge McCarville's credibility findings were unreasonable. Judge McCarville explained his basis for finding father more credible than mother, and the evidence was sufficient to support such a finding. Even though, as mother notes, there was evidence that could be construed as showing that some of father's statements were not believable, there also was substantial evidence supporting Judge McCarville's finding that father was generally a credible witness. As Judge McCarville correctly stated, this court is therefore "stuck with that." (*Berniker, supra,* 30 Cal.2d at p. 444; *Boeken, supra,* 127 Cal.App.4th at p. 1658.)

VIII

SHARING COSTS

Mother contends the trial court abused its discretion in ordering mother to pay Dr. Suiter $1,750, for half of his psychological evaluation fees.

A. Applicable Law

Section 1032, subdivision (b) entitles the prevailing party in an action to recover costs as a matter of right. Section 1033.5, subdivision (a) lists the items that are allowable as costs under section 1032. Such allowable items include expert witness fees

ordered by the court. (§ 1033.5, subd. (a)(8); *Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 948 (*Sanchez*).) Section 1033.5, subdivision (b) "limits the items that are allowable as costs, and specifically prohibits fees of expert witnesses not ordered by the court, 'except when expressly authorized by law.' (Code Civ. Proc., § 1033.5, subd. (b)(1).)" (*Sanchez,* at p. 948.)

"When Code of Civil Procedure section 1033.5 was enacted in 1986, existing case law provided that the fee of an expert witness appointed by the court under Evidence Code sections 730[] and 731[] was allowable as a cost, while the fee of an expert not so appointed was not allowable. [Citations.] Accordingly, an expert witness ordered by the court is one who has been appointed by the court pursuant to Evidence Code section 730 or other statutory authority. In the absence of an order of the trial court appointing an expert witness, the fees of an expert witness are not recoverable as costs under Code of Civil Procedure section 1032. [Citation.] The reason for the distinction is related to the partiality of the expert witness. '"[W]here, as here, an [expert] is not appointed by the court but is employed by one of the parties, 'the temptation to act in the interest of such party must be apparent' and 'the court should not require the opposite party to pay for the services thus rendered.'" [Citations.]' (*Id.* at pp. 440-441.)" (*Sanchez, supra,* 75 Cal.App.4th at pp. 949-950.)

Under Evidence Code section 730, courts regularly appoint marriage, family, or child psychologists to investigate and prepare reports concerning child custody matters, with the parties often sharing the cost of the court-ordered evaluations. (See, e.g., *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1232; *Lester v. Lennane* (2000) 84

Cal.App.4th 536, 545.) California Rules of Court, rule 5.220 makes clear it is the trial court's duty to "[d]etermine and allocate between the parties any fees or costs of the evaluation." (California Rules of Court, rule 5.220(d)(1)(D); see also *In re Marriage of Laurenti* (2007) 154 Cal.App.4th 395, 403.)

B. Payment of Half of Dr. Suiter's Psychological Evaluation Fees

Mother argues the court did not have authority to order mother to pay half of Dr. Suiter's fees for a psychological evaluation ordered under Evidence Code section 733. Evidence Code section 733 provides: "Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, *their fees shall be paid by the party calling them* and only ordinary witness fees shall be taxed as costs in the action." (Italics added.)

In the instant case, the record indicates there was confusion as to whether Dr. Suiter was a court-appointed evaluator under Evidence Code section 730 or an expert under Evidence Code section 733. This is because in February 2008, the court ordered Dr. Miller to conduct a psychological evaluation of the parties under Evidence Code section 730. The court received Dr. Miller's psychological evaluation report in July 2008. In September 2009, both parties acknowledged there had been a change in circumstances warranting a supplemental report by Dr. Miller, and the court ordered a supplemental evaluation. Rather than conducting a supplemental evaluation, Dr. Miller assisted the parties with settlement negotiations, which were not successful. Shortly before the trial, in November 2010, father filed a motion requesting the parties meet with

a section 733 expert for an evaluation. The November 3, 2010, minute order states: "The 730 evaluation will come into evidence and the court's previous order granting 733 remains. Parties are to cooperate with Dr. Suiter."

Dr. Suiter's report suggests he was ordered to conduct an evaluation under section 730. He stated in his report that his comprehensive psychological evaluation of the parties was provided at the court's request. He noted that Dr. Miller conducted an initial 730 evaluation of the parties. The parties later met with Dr. Miller a second time. "With the second meeting with Dr. Miller there was apparently an attempt to mediate their differences as it was then concluded there was a conflict raised as the evaluator had conducted the evaluation and was then acting in a mediator role." This may have been why Dr. Suiter, rather than Dr. Miller, was appointed to conduct another psychological evaluation shortly before the trial.

Dr. Suiter testified that he believed when he conducted the psychological evaluation that the court had appointed him to conduct a 730 evaluation. He therefore performed the evaluation as such, rather than as a 733 evaluation. The court informed Dr. Suiter during the trial that the evaluation was a 733 evaluation. Dr. Suiter said he had not been aware of this. His office told him it was a 730 evaluation. Dr. Suiter noted: "But it had a unique characteristic in that Dr. Miller had conducted the original evaluation approximately two, two and a half years ago. The parties had then returned to see her for an updated evaluation. [¶] But she had attempted to assist them with their dispute and entered into some – I wasn't sure if it was one or more sessions of mediation – and there was then an objection that she couldn't be both an evaluator and a mediator.

And so she wasn't able to complete the updated evaluation and that, in turn, then my understanding was that I was appointed to conduct the updated evaluation."

In the court's statement of decision and judgment of paternity, Judge McCarville stated that the court appointed Dr. Suiter pursuant to Evidence Code section 733. The court further stated that, "With respect to the allocation of monies for both the 730 and 733 reports [mother] is ordered to reimburse [father] as and for Dr. Miller's report the sum of $2,400. And as to Dr. Suiter's report the sum of $1,750."

Although the circumstances were confusing as to whether Dr. Suiter's evaluation was intended to be a 730 or 733 evaluation, it is clear from the trial court's statement of decision and judgment of paternity that the court found it had ordered Dr. Suiter to conduct a 733 evaluation. Since there was substantial evidence supporting the court's finding that the court ordered Dr. Suiter appointed to conduct a 733 evaluation, we must uphold that finding. (*Berniker, supra,* 30 Cal.2d at p. 444; *Boeken, supra,* 127 Cal.App.4th at p. 1658.) We therefore conclude the trial court erred in ordering mother to pay one-half of the cost of Dr. Suiter's psychological evaluation. (*Sanchez, supra,* 75 Cal.App.4th at pp. 949-950; Evid. Code, § 733.)

IX

DISPOSITION

The trial court order contained in the judgment of paternity entered on May 5, 2011, stating that "Respondent is ordered to reimburse Petitioner" "as to Dr. Suiter's report the sum of $1,750," is ordered vacated and stricken from the judgment and

statement of decision. In all other regards the judgment is affirmed. The parties are ordered to pay their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.